



Agenda Date: 03/17/04
Agenda Item: 2C

STATE OF NEW JERSEY

Board of Public Utilities

Two Gateway Center
Newark, NJ 07102

www.bpu.state.nj.us

IN THE MATTER OF THE APPLICATION OF)
JERSEY CENTRAL POWER & LIGHT COMPANY)
FOR THE APPROVAL OF THE TERMINATION)
OF THE POWER PURCHASE AGREEMENTS)
CURRENTLY EXISTING BETWEEN IT AND)
CALPINE NEWARK, LLC AND CALPINE)
PARLIN, LLC AND THE EXECUTION OF A NEW)
POWER PURCHASE AGREEMENT WITH CES)
MARKETING II, LLC OR ITS DESIGNEE)

and)

IN THE MATTER OF THE APPLICATION OF)
PUBLIC SERVICE ELECTRIC AND GAS)
COMPANY FOR THE APPROVAL OF AN)
AMENDMENT TO THE GAS SERVICE)
AGREEMENT CURRENTLY EXISTING)
BETWEEN IT AND JERSEY CENTRAL POWER)
& LIGHT COMPANY)

ENERGY

ORDER OF APPROVAL

DOCKET NO. EM04010045

(SERVICE LIST ATTACHED)

BY THE BOARD:

By letter dated January 22, 2004, Jersey Central Power & Light Company ("JCP&L") filed a joint petition on behalf of itself and Public Service Electric and Gas Company ("PSE&G") (collectively, "Companies") with the Board of Public Utilities ("Board") to (i) terminate two existing power purchase agreements, between JCP&L and Calpine Newark, LLC ("Calpine-Newark"), and between JCP&L and Calpine Parlin, LLC ("Calpine-Parlin"), and execute a new power purchase agreement ("New PPA") dated January 21, 2004, between JCP&L and CES Marketing II, LLC or its designee ("CES") (Calpine-Newark, Calpine-Parlin and CES are collectively referred to as "Calpine"), and (ii) amend an existing gas agreement between JCP&L and PSE&G associated with the existing power purchase. JCP&L is requesting expedited treatment of this matter. JCP&L and PSE&G are requesting confidential treatment of certain information contained in the joint petition. A copy of the joint petition was served upon the Division of the Ratepayer Advocate ("Advocate").

Background

The original parties to the power purchase agreements, as discussed below, were affiliates of O'Brien Cogeneration, Inc. ("O'Brien"), which subsequently filed for reorganization under

Chapter 11 of the Federal Bankruptcy Code on September 26, 1994. In 1996, NRG Energy, Inc. ("NRG") acquired O'Brien's interest in the power purchase agreements as the successful bidder in the bankruptcy proceeding for O'Brien's assets. Through a subsequent assignment of a portion of NRG's interest, the parties to the power purchase agreements became Calpine-Newark and Calpine-Parlin, wholly owned subsidiaries of Calpine Cogeneration Corporation ("Calpine Cogen"). Calpine Cogen's stockholders include Calpine Power Company, a subsidiary of Calpine Corporation, with an 80% interest, and NRG, with a 20% interest. Based on representations provided by Calpine, JCP&L asserts that all necessary consents and/or authorizations by NRG, in its capacity as a stockholder, have been granted to Calpine Cogen and/or its subsidiaries to take such actions as each in its sole discretion deems necessary or appropriate to pursue and consummate the transactions that are the subject of the joint petition.

Calpine-Newark

Calpine-Newark owns and operates the natural gas-fired, combined-cycle cogeneration facility located in Newark, New Jersey ("Newark Facility"), where it at one time supplied steam to the Newark Boxboard plant and sold the full electrical output to JCP&L as a qualifying facility ("QF") under the Public Utility Regulatory Policies Act of 1978 ("PURPA"). The Newark Facility is nominally rated at approximately 52 megawatts ("MW") of capacity. Through a series of amendments, the Newark Facility currently operates as an exempt wholesale generator ("EWG"), as provided for by the Energy Policy Act of 1992. JCP&L currently purchases power from Calpine-Newark under a power purchase agreement, as discussed below ("Existing Newark PPA"), which requires JCP&L to purchase 52 megawatts ("MW") of capacity and associated energy per year through November 10, 2015 from the Newark Facility.

On March 10, 1986, JCP&L and O'Brien (Newark) Cogeneration, Inc. ("O'Brien-Newark"), entered into a Power Purchase Contract ("Original Newark PPA"), pursuant to which O'Brien-Newark agreed to sell to JCP&L, and JCP&L agreed to purchase from O'Brien-Newark, 100% of the net electrical output produced by the Newark Facility which, at that time, had an estimated capacity rating of 52 MW. The Original Newark PPA had a 25-year term that began on the date of first commercial operation of the Newark Facility. The Original Newark PPA was entered into in recognition of JCP&L's obligations under PURPA, as implemented by the Federal Energy Regulatory Commission ("FERC") and the Board. On June 2, 1986, JCP&L and O'Brien-Newark entered into a First Amendment to the Original Newark PPA to amend the initial delivery date of the Original Newark PPA. The Board approved the Original Newark PPA, and the First Amendment thereto, by Order dated June 30, 1986, in Docket No. EM8604395. JCP&L and O'Brien-Newark subsequently entered into a Second Amendment to modify certain operational and pricing terms on March 1, 1988. The Second Amendment was approved by Order dated June 30, 1988 in Docket No. EM8604395. A Third Amendment was entered into by JCP&L and O'Brien-Newark which: (1) provided for the assignment of the Original Newark PPA, as amended, from the O'Brien affiliate to NRG; (2) allowed NRG to seek "exempt wholesale generator" status from the FERC, thereby eliminating the obligation to maintain the Newark Facility as a QF; (3) modified certain operational and pricing terms; and (4) assigned the responsibility for the supply of natural gas for the Newark Facility from NRG to JCP&L. The Board approved the Third Amendment by Order dated April 29, 1996 in Docket No. EM8604395, a copy of which is attached to the joint petition as Exhibit E. Copies of the Original Newark PPA, and the First, Second and Third Amendments are attached to the joint petition as Exhibit A and, collectively, are hereinafter referred to as the "Existing Newark PPA."

Calpine-Parlin

Calpine-Parlin owns and operates the natural gas-fired, combined-cycle cogeneration facility located in Parlin, New Jersey ("Parlin Facility") (collectively with the Newark Facility, "Facilities"), where it supplies steam, capacity and energy to the Dupont Parlin plant. JCP&L currently purchases power from Calpine-Parlin under a power purchase agreement, as discussed below ("Existing Parlin PPA"), which requires JCP&L to purchase 41 MW of capacity and associated energy per year through June 17, 2011 on a base load basis (i.e., non-dispatchable), and 73 MW on an economic dispatch basis, from the Parlin Facility.

On October 20, 1986, JCP&L and O'Brien (Parlin) Cogeneration, Inc. ("O'Brien-Parlin"), entered into a Power Purchase Contract ("Original Parlin PPA"), pursuant to which O'Brien-Parlin agreed to sell to JCP&L, and JCP&L agreed to purchase from O'Brien-Parlin, 92 MW of the electrical output produced by the Parlin Facility which, at that time, had an estimated capacity rating of 117 MW. The Original Parlin PPA had a 20-year term that began on the date of first commercial operation of the Parlin Facility. The Original Parlin PPA was entered into in recognition of JCP&L's obligations under PURPA, as implemented by the FERC and the Board. The Board approved the Original Parlin PPA by Order dated February 17, 1987, in Docket No. EM86121345. On April 9, 1991, JCP&L and O'Brien-Parlin entered into a First Amendment to the Original Parlin PPA to modify certain operational and pricing terms, including the ability of JCP&L to purchase an additional 22 MW of electrical output from the Parlin Facility on a dispatchable basis. The First Amendment was approved by Order dated February 20, 1992 in Docket No. EM86121345. An Amended and Restated Power Purchase Agreement was subsequently entered into by JCP&L and the O'Brien affiliate which: (1) provided for the assignment of the Original Parlin PPA, as amended, from the O'Brien affiliate to NRG; (2) allowed NRG to seek "exempt wholesale generator" status from the "FERC, thereby eliminating the obligation to maintain the Parlin Facility as a QF; (3) modified certain operational, purchase and pricing terms; and (4) assigned the responsibility for the supply of natural gas for the Parlin Facility to JCP&L. The Board approved the Amended and Restated Power Purchase Agreement by Order dated April 29, 1996 in Docket No. EM86121345, a copy of which is attached to the joint petition as Exhibit E. A copy of the Amended and Restated Power Purchase Agreement is attached to the joint petition as Exhibit B and is hereinafter referred to as the "Existing Parlin PPA."

Existing PPAs

Under the Existing Newark PPA, JCP&L purchases 52 MW of capacity and associated energy per year for the term of the agreement. The Existing Newark PPA has a term that began on the date of first commercial operation of the Newark Facility, which was November 11, 1990, and ends on November 10, 2015. The current purchase price for energy under the Existing Newark PPA is a fixed base rate expressed in cents per kilowatt-hour ("kWh"), which is multiplied by specified multipliers during on-peak and off-peak periods. JCP&L also supplies fuel to the Newark Facility at no cost under an Interim Gas Service Agreement ("Interim GSA"), as discussed below, subject to a guaranteed contract heat rate. JCP&L has the ability to exercise 700 hours of economic energy delivery curtailments to the Newark Facility per calendar year during off-peak periods. The fuel costs incurred by JCP&L are in addition to the specified payments under the Existing Newark PPA described above and are, therefore, part of the total cost of the Existing Newark PPA to JCP&L.

Under the Existing Parlin PPA, JCP&L purchases 41 MW of capacity and associated energy per year for the term of the agreement. The Existing Parlin PPA has a term that began on the date of first commercial operation, which was June 18, 1991, and ends on June 17, 2011. The current purchase price for energy under the Existing Parlin PPA for the base (i.e. non-dispatchable) 41 MW of capacity and associated energy is comprised of a capacity charge expressed in cents per kWh and is applied to energy delivered during on-peak hours in on-peak months. All base capacity charges, however, are applied only if the energy is delivered. The pricing associated with the dispatchable capacity of 73 MW is comprised of a fixed capacity component and a variable energy component. The fixed component is tied to the Parlin Facility's summer rating and adjusted to reflect availability. The variable energy component of the price for the economic dispatch of the dispatchable capacity is intended to be the Parlin Facility's variable operation and maintenance cost. JCP&L also supplies fuel to the Parlin Facility at no cost for the base and dispatchable energy under the same Interim GSA that services the Newark Facility, subject to a guaranteed contract heat rate. The fuel costs incurred by JCP&L are in addition to the specified capacity and energy payments under the Existing Parlin PPA described above and are, therefore, part of the total cost of the Existing Parlin PPA to JCP&L.

JCP&L asserts that the prices that it pays under the Existing PPAs are significantly above today's market prices for power, resulting in stranded costs for JCP&L that are recoverable from its customers, pursuant to the Board's Final Order, dated March 7, 2001, in Docket Nos. EO97070458, EO97070459 and EO97070460 ("Final Order"). JCP&L asserts that the stranded costs through the remaining terms of the Existing PPAs are currently estimated at \$295 million, on a net present value ("NPV") basis, as of April 30, 2004, using a discount rate of 6.75%.

JCP&L proposes to terminate the Existing PPAs and enter into the New PPA, which will effectuate a restructuring of the Existing PPAs that JCP&L asserts will result in a substantial reduction in stranded costs, to be reflected in the form of an up-front, lump sum Restructuring Credit payment from Calpine. JCP&L will use the Restructuring Credit payment from Calpine to make the required payments to Calpine in connection with the termination of the Existing PPAs and the required payment to PSE&G in connection with the termination of the Interim GSA, with the remaining amount to be applied as a reduction to JCP&L's MTC Deferred Balance. To facilitate entering into the New PPA, JCP&L entered into separate Termination Agreements with Calpine-Newark and Calpine-Parlin, wherein the parties thereto agreed to terminate the Existing PPAs. Copies of the Termination Agreements are attached to the joint petition as Exhibits D-1 and D-2.

New PPA

JCP&L asserts that, in light of the success to date of the statewide basic generation service auction process conducted by the Board, JCP&L may not have any further direct need for capacity. JCP&L asserts that, rather than obligating itself to purchase capacity under the New PPA, JCP&L will have an option to receive, at market rates, up to 166 MW of capacity through June 30, 2011 and up to 52 MW of capacity thereafter until the end of the term of the New PPA. JCP&L asserts that this option establishes a minimum level of available capacity credits, regardless of the capacity rating or status of either of the Facilities, and assures that JCP&L will have access to the capacity, if needed. As discussed below, the Parlin Facility will also remain available for reliability purposes.

JCP&L asserts that the New PPA provides for substantially the same energy delivery requirements as projected under the Existing PPAs, while providing an up-front payment which, as reduced by transaction and other expenses, will be used to reduce JCP&L's MTC Deferred Balance (as such term is defined in the Final Order). The rates payable by JCP&L for energy and capacity delivered under the New PPA consist of three components: a fixed component ("Fixed Charge"), an energy component ("Energy Charge") and, to the extent JCP&L exercises its option to procure capacity from Calpine, a capacity component ("Capacity Charge"). The rates to be paid under the Fixed Charge component, which are structured to be approximately equal to the projected above-market portion of the pricing under the Existing PPAs and applied on a \$/MWh basis. The rates to be paid under the Energy Charge component will be equal to the day-ahead JCP&L zone locational marginal price ("LMP") for firm energy as reported by PJM Interconnection, L.L.C. ("PJM") and applied on a per MWh basis. The Fixed Charge and Energy Charge are contingent on full receipt of scheduled deliveries, subject to Calpine's ability to provide "make-up" deliveries during confined periods.¹ The Capacity Charge is a pass-through of Calpine's procurement cost for capacity purchased under JCP&L's option to purchase market capacity.

JCP&L asserts that separating the contract payments into the Fixed Charge, Energy Charge and Capacity Charge facilitates Calpine's monetization of the Fixed Charge revenues under the New PPA. JCP&L also asserts that setting the Energy Charge and Capacity Charge equal to market price significantly reduces the risk of non-delivery and enhances the credit quality of the Fixed Charge which Calpine will monetize. JCP&L further asserts that the value of this financing benefit improves the overall savings available from the transaction and, as a result, improves the overall savings available to JCP&L's customers. JCP&L also has the option to purchase up to 67 MW per hour of additional energy at any time through June 30, 2011 at the LMP.

JCP&L asserts that the New PPA assures the continued availability to JCP&L of reliable energy and, when requested, capacity. Over the term of the New PPA, Calpine will make available to JCP&L energy and, when requested, capacity, from a portfolio of resources, which may include the Facilities. Although Calpine may provide capacity and energy from sources other than the Facilities, Calpine-Parlin is required, through a separate Operating and Maintenance Agreement a copy of which is attached to the joint petition as Exhibit F, to maintain the status of the Parlin Facility as a PJM market seller, maintaining a minimum plant capacity rating of the Parlin Facility at 114 MW plus or minus 5% per day, and to keep the Parlin Facility available for PJM reliability purposes. In addition, Calpine-Parlin must develop and adhere to a long-term operating plan approved by an independent engineer and JCP&L.

The contracted-for monthly energy deliveries in the New PPA are as shown in Exhibit 1 to the New PPA. As noted above, JCP&L does not pay either the Fixed Charge component or the Energy Charge component of the purchase price for any energy not delivered to it under the New PPA, so customers are not at risk in the event of non-delivery. However, the New PPA provides Calpine with certain "make-up" rights in the event deliveries are curtailed due to system emergencies or for certain other reasons. JCP&L asserts that this provision enhances Calpine's ability to finance the New PPA.

Under the New PPA, JCP&L has the option to cause Calpine to arrange for up to 166 MW of capacity credits per day through June 30, 2011 and up to 52 MW of capacity credits per day

¹ In the event that JCP&L elects not to accept delivery of any energy, which it has the option to do, it must still pay the Fixed Charge.

thereafter until the end of the term of the New PPA, to be made available to JCP&L from any PJM Capacity Resource(s) (as defined in the PJM Reliability Assurance Agreement). JCP&L asserts that this provision essentially equals the amount of capacity currently made available to JCP&L from the Facilities and that the right to receive capacity credits under the New PPA that meet PJM eligibility requirements will ensure that JCP&L will continue to have such capacity available for use in meeting its capacity obligation in the PJM region, to the extent needed. Under the New PPA, Calpine has agreed to deliver the energy to JCP&L at the JCP&L transmission zone and shall be responsible for the costs of transmitting the energy to the applicable delivery point. In addition, Calpine will compensate JCP&L for any penalties payable by JCP&L to PJM in the event that contracted-for electricity is not provided under the New PPA.

Steam Hosts

JCP&L asserts that any issues involving the impact of these transactions on the steam hosts for the Newark Facility and Parlin Facility have been addressed by Calpine, as asserted in a letter from Calpine to JCP&L, dated January 14, 2004, attached to the joint petition as Exhibit G. In its letter, Calpine asserts that the Newark Boxboard Company, steam host for the Newark Facility, permanently ceased operations on July 15, 2003. Calpine asserts that, upon closing of the facility, Calpine immediately ceased providing steam and electricity to the former steam host. Calpine also asserts that DuPont, steam host for the Parlin Facility, remains unaffected by the New PPA, as Calpine-Parlin will continue to operate the Parlin Facility and satisfy its contractual obligations to DuPont.

Restructuring Credit

JCP&L asserts that, in consideration of, among other things, the right of Calpine to meet its supply obligations from any available source, rather than being required to supply solely from the Facilities, and in recognition of the ability of Calpine to monetize the New PPA as a result of this flexibility, on the Effective Date of the New PPA, JCP&L will receive a Restructuring Credit from Calpine. JCP&L asserts that, after payment, among other things, of fees associated with the termination of the Existing PPAs and payment to PSE&G to terminate the Interim GSA, as discussed below, and certain other specified payments, JCP&L will retain the net amount of approximately \$52.8 million, as described in the joint petition. This amount includes an incremental \$1 million that Calpine agrees to pay JCP&L if this Order is issued on or before March 24, 2004. The Restructuring Credit is increased by \$11,000 for each day prior to March 24, 2004 that this Order is issued.² JCP&L proposes to immediately credit the full net amount of the Restructuring Credit to its MTC Deferred Balance (as such term is described in the Final Order), less transaction and other expenses, as discussed below.

Recovery of Restructuring-Related Costs

JCP&L asserts that the termination of the Existing PPAs and the entering into of the New PPA would result in a substantial reduction in JCP&L's stranded costs, which reduction would be passed through to JCP&L's customers through credits to JCP&L's MTC Deferred Balance authorized by the Board in its Final Order. JCP&L requests a determination that the New PPA would result in a substantial reduction in JCP&L's total stranded costs, which resulting savings would be passed through to customers on a full and timely basis, pursuant to N.J.S.A. 48:3-61(l)(1). JCP&L further seeks a finding by the Board that, pursuant to N.J.S.A. 48:3-61(l)(3)(a),

² The Restructuring Credit will be reduced for each day after May 10, 2004 that this Order becomes final and non-appealable, pursuant to a schedule set forth in an exhibit to the New PPA.

all costs and charges to be paid by JCP&L for capacity and energy, pursuant to the New PPA, would qualify for full and timely recovery by JCP&L, and that any such costs which are above market would be recovered through the MTC in JCP&L's tariff as "stranded costs" pursuant to N.J.S.A. 48:3-61(a)(3) and N.J.S.A. 48:3-61(l)(3)(a). JCP&L also seeks a finding that it would be able to fully and timely recover from its customers all costs and expenses associated with the termination of the Existing PPAs and the entering into of the New PPA. In addition, JCP&L asserts that the Board's approval of the New PPA should not be subject to modification except as jointly requested by JCP&L and Calpine, pursuant to N.J.S.A. 48:3-61(l)(4).

Interim GSA

By concurrent Orders dated December 22, 1993, in Docket Nos. GM93060243 and GM93070267, the Board approved gas service agreements between PSE&G and O'Brien-Parlin and O'Brien-Newark, predecessors of Calpin-Parlin and Calpine-Newark (collectively, "Original GSAs"). Under the Original GSAs, PSE&G was authorized to provide natural gas sales and transportation service to the Facilities.

The Original GSAs were amended by the Interim GSA, which became effective pursuant to a Board Order dated April 24, 1996 in Docket No. GM96040262 ("Interim GSA Order"). The Interim GSA was necessitated by amendments to the Existing PPAs resulting from the O'Brien bankruptcy filing and the replacement of O'Brien with JCP&L as the party responsible for the procurement of gas supplies for the two facilities. As discussed above, JCP&L supplies fuel to the Facilities at no cost under an Interim GSA, subject to a guaranteed contract heat rate, with the ability to exercise 700 hours of economic energy delivery curtailments to the Newark Facility per calendar year during off-peak periods. The Interim GSA provides for natural gas sales and transportation service to the Facilities, and is currently the means by which PSE&G provides such service.

PSE&G asserts that there are two primary benefits to its firm natural gas customers associated with the existing Interim GSA. First, the revenues under the Interim GSA provide an ongoing contribution towards PSE&G's fixed costs, with PSE&G's firm gas customers benefiting from these revenues due to a credit to PSE&G's levelized gas adjustment clause of the revenues received by PSE&G. Second, a provision of the Interim GSA allows PSE&G to interrupt deliveries to the Facilities when mean temperatures are forecasted to reach specified levels. Accordingly, PSE&G asserts that the current arrangement provides a very economical peaking service for PSE&G's firm gas customers.

New Gas Agreements

PSE&G asserts that in order to effectuate the New PPA, and to allow Calpine to operate the Facilities as "merchant" plants, Calpine and PSE&G have negotiated a buyout of JCP&L's remaining obligations under the Interim GSA, and PSE&G has entered into new natural gas supply arrangements with Calpine for future service to the Facilities. Under the terms of an Acceleration and Service Transfer Agreement ("Transfer Agreement") between PSE&G, JCP&L, Calpine-Parlin and Calpine-Newark, the Original GSAs will be replaced by separate Amended and Restated Gas Service Agreements ("Amended GSAs") for each of the Facilities, and the Interim GSA will be terminated. Calpine will assume the obligation, formerly held by JCP&L, for the procurement of gas supplies to the Facilities. Calpine will also assume the obligation to fund the buyout payment to be made, on behalf of JCP&L, to PSE&G. Therefore, the Board's approval of the Transfer Agreement and the Amended GSAs is a necessary condition precedent

to the effectiveness of the New PPA. A copy of the Transfer Agreement is attached to the joint petition as Exhibit H. The Amended GSAs for the Parlin Facility and Newark Facility are attached to the Transfer Agreement as Schedules 1 and 2, respectively.

The Amended GSAs will provide for the future delivery of gas to the Facilities through a transportation only service. Because Calpine is buying out the future obligations of JCP&L under the Interim GSA, the pricing provisions of the Amended GSAs have been modified significantly. For the Parlin Facility, the pricing provisions include a monthly demand charge and commodity charges. For the Newark Facility, the pricing provisions include commodity charges only. The pricing provisions of both of the Amended GSAs reflect the up-front payment by Calpine of the buyout amount that serves to reduce the future monthly obligations under the Amended GSAs.

PSE&G asserts that it was not willing to agree to a buyout of the Interim GSA or to enter into the Amended GSAs unless both the amount of the buyout and the structure of the new agreements could achieve a result that would leave both PSE&G and its gas customers as well off as they are under the Interim Gas Agreement. PSE&G asserts that the buyout in the amount of \$22 million provided for in the Transfer Agreement, when taken together with the ongoing obligations assumed by Calpine in the Amended GSAs, satisfy this requirement by providing that JCP&L make PSE&G and its firm gas customers whole for all of the revenues that PSE&G would have otherwise been paid under the Interim Gas Agreement. PSE&G further asserts that the \$22 million buyout amount is equal to the present value of the revenues PSE&G would have realized under the Interim Gas Agreement through the end of its term, including the difference between the amount paid by JCP&L pursuant to the Interim Gas Agreement for the underlying pipeline capacity PSE&G relies upon to serve JCP&L, and the market value of that capacity, less ongoing payment obligations by JCP&L (assumed by Calpine) under the Amended GSAs. In addition, PSE&G also asserts that the retention of the pipeline capacity currently used to meet its sales obligations to JCP&L under the Interim Gas Agreement preserves the peak day supplies that PSE&G's customers currently receive.

Treatment of Gas Revenues

Pursuant to the Interim GSA Order, revenues received by PSE&G from JCP&L under the Interim GSA are credited to PSE&G's firm gas customers, with the exception of a portion of the revenues that is retained by PSE&G. In the Interim GSA Order, the Board provided that PSE&G share with its firm gas customers the incremental revenues to be realized under the Interim GSA compared to the Original GSAs. PSE&G asserts that the joint petition is based upon a continuation of this same revenue treatment for the buyout of JCP&L's future obligations under the Interim GSA, and that the continuation of this sharing, and Board approval of same, is a condition precedent to the effectiveness of both the Transfer Agreement and the New PPA.

On March 4, 2004, an informal settlement conference was held among Board Staff, the Advocate and PSE&G to discuss the above gas agreements and the treatment of gas revenues. By letter dated March 12, 2004, PSE&G acknowledges agreement with Board Staff and the Advocate to terminate the existing margin sharing formula and to credit the entire buyout amount of \$22 million to PSE&G's firm natural gas customers and to apply the entire amount to the fixed cost component of said customers' total natural gas costs, consistent with prior Board-approved ratemaking treatment in PSE&G's Basic Gas Supply Service ("BGSS")/Levelized Gas Adjustment Clause ("LGAC").

Requests for Confidential Treatment

On December 4, 2003, Board Staff and the Advocate executed an Agreement of Non-Disclosure of Information Claimed to be Confidential with JCP&L and on January 21, 2004, Board Staff and the Advocate executed an Agreement of Non-Disclosure of Information Claimed to be Confidential with PSE&G (such agreements being collectively referred to as the "Confidentiality Agreements"). Pursuant to the terms of the Confidentiality Agreements, information asserted to be confidential in the joint petition has been provided to Board Staff and the Advocate, as have certain responses to discovery requests.

JCP&L asserts that all references to the pricing provisions or values under the Existing PPAs and the New PPA are confidential in nature inasmuch as they contain pricing, delivery and other information that is proprietary to JCP&L and Calpine. JCP&L asserts that these pricing provisions or values include the buy-down or up-front payment amounts and aggregate amounts of savings derived therefrom, as set forth in footnote 2 and paragraphs 5, 10, 14, 18, 21, 22, 30, 39 and 43 of the joint petition.³ JCP&L also asserts that, included in the category of confidential information for the same reasons are: Article III, Section D of the New PPA and Exhibits 1 and 3 thereto, all of which are attached hereto as Exhibit C to the joint petition. Accordingly, JCP&L requests that such information be kept confidential and not be disclosed to anyone other than the Board, Board Staff, and the Advocate, for a period of not fewer than two (2) years from January 22, 2004, the filing date of the joint petition.

JCP&L submitted an affidavit of Kevin M. Siedt, Staff Business Analyst – Rates Strategy in the Rates and Regulatory Affairs Department with FirstEnergy Service Company, which provides rates-related support services to and for JCP&L, in support of JCP&L's request for confidential treatment. Mr. Siedt asserts that the Existing PPAs and New PPA contain information that, if publicly disclosed, would provide a disadvantage to JCP&L when JCP&L attempts to renegotiate other non-utility generator ("NUG") contracts in the future. He asserts that disclosure of commercially sensitive pricing, delivery, financial, forecast and other proprietary information could lead to higher prices than might otherwise be achieved with respect to subsequent renegotiated NUG contracts.

By letter dated January 30, 2004, JCP&L submitted certain redacted and unredacted confidential discovery request responses, as more fully described below, and sought to supplement the aforementioned January 22, 2004 letter with respect to the confidential information that has been thus far utilized in this proceeding. JCP&L requests that the Board permanently treat the redacted portions of the joint petition and discovery requests, including JCP&L's confidential responses to specific Advocate discovery requests submitted on February 20, 2004, as confidential. Specifically, JCP&L requests confidential treatment of the unredacted confidential copies of JCP&L's anticipatory discovery request responses designated 5, 7 (Attachment), 17 and 25 and of its discovery request responses designated as RAR-E-2, RAR-E-4, RAR-E-9, RAR-E-11 (Attachment), RAR-E-13 and RAR-E-14.⁴ JCP&L asserts that the above discovery responses were not submitted for official filing with the Board, nor was the information conveyed with the intent that such information would become government records within the meaning of the Open Public Records Act ("OPRA") pursuant to N.J.A.C. 14:1-12.1 et seq.

³ JCP&L no longer seeks confidential treatment of footnote 2 and paragraphs 10, 21, 22, 30, 39 and 43 of the Joint Petition.

⁴ JCP&L no longer seeks confidential treatment of RAR-E-13.

PSE&G contends that all references to the pricing provisions or values under the Transfer Agreement and the Amended GSAs are confidential in nature inasmuch as they contain pricing information that is proprietary to PSE&G and Calpine. PSE&G asserts that these pricing provisions include information contained in paragraphs 50, 52, 53, 54 and 55 of the joint petition and in sections 2 and 3 of the Transfer Agreement (Exhibit H to the joint petition), and certain information contained in paragraphs 1.5, 1.18, 3.3, 4.1, 5.3, 5.4 and 9.2 of the Amended GSAs (Schedules 1 and 2 to the Transfer Agreement), which contain commercially sensitive and proprietary information.⁵ Accordingly, PSE&G requests that such information be kept confidential and not be disclosed to anyone other than the Board, Board Staff, and the Advocate, for an indefinite period.

PSE&G submitted an affidavit of Frederick W. Lark, Vice President of Business Analysis with PSE&G, in support of PSE&G's request for confidential treatment. Mr. Lark asserts that the joint petition, the Transfer Agreement and the Amended GSAs contain pricing information that, if publicly disclosed, could provide an advantage to third parties that may seek to negotiate gas supply transactions with PSE&G in the future. He asserts that third parties with access to pricing information might be able to leverage that information to obtain a gas supply agreement with PSE&G that is less favorable to PSE&G than had the pricing information not been available.

Request for Expedited Treatment

JCP&L requests the Board's expeditious review of the joint petition. JCP&L asserts that the termination of the Existing PPAs and the entering into of the New PPA are an integral part of JCP&L's efforts to reduce stranded costs, as required by N.J.S.A. 48:3-49 et seq. JCP&L further asserts that the transactions have additional value to Calpine as a corporation the sooner the transactions close and the New PPA becomes effective. To the extent that the Board issues a written Order with respect to these matters on or before March 24, 2004, the New PPA provides for further savings to accrue to the benefit of customers.

Advocate Comments

By letter dated March 15, 2004, the Advocate submitted its comments in this matter. The Advocate does not object to the approval of the New PPA, subject to the following provisions. The Advocate submits that reasonable, prudently incurred and new incremental transaction costs should be permitted as an offset to the Restructuring Credit only after the parties to this matter have had an opportunity to review them in a separate proceeding. The Advocate also recommends that, in light of the efforts of the parties having worked expeditiously to review this matter in a thorough manner to obtain a written Order on or before March 24, 2004, the Board should require that JCP&L's customers receive the full net amount of the Restructuring Credit in the amount of \$52.8 million regardless of the date of the Order.

The Advocate notes that, as a result of discussions among itself, PSE&G and Board Staff, a resolution was reached with regard to the elimination of the existing margin sharing formula for the Interim GSA whereby the full amount of the buyout amount related to the termination of the Interim GSA will be credited to PSE&G's firm gas customers. The Advocate now believes the Amended GSAs are reasonable and recommends their approval.

⁵ PSE&G no longer seeks confidential treatment of paragraphs 53, 54 and 55 of the joint petition and Sections 2 and 3 of the Transfer Agreement.

Discussion and Findings

Having reviewed this matter, the Board HEREBY FINDS that the termination of the Existing PPAs and the negotiation and execution of the New PPA appears to comply with the directives and conditions set forth in the Final Order, which requires JCP&L to take steps to mitigate NUG stranded costs and to make reasonable efforts to renegotiate its above-market NUG contracts. While the instant agreement will not eliminate above-market NUG costs associated with the New PPA, based upon current market price projections, it appears that the rates, terms and conditions of the New PPA will provide immediate and substantial benefits to customers relative to the Existing PPAs. The New PPA should also provide a greater reliability of energy delivery to JCP&L as a result of Calpine's obligation to provide energy from its portfolio of generation resources rather than from a specific facility.

An immediate and noteworthy benefit of the New PPA will be the receipt by JCP&L of the up-front net Restructuring Credit payment in the amount of approximately \$52.8 million, which, within two days of the effective date of the New PPA, will be credited by JCP&L to the MTC Deferred Balance. The front-end loading of these savings through the Restructuring Credit payment will help to mitigate the potential impacts on customers of the existing MTC Deferred Balance. However, as noted above, during the term of the New PPA, actual natural gas prices may vary either above or below the projections used to establish the Fixed Charge component of the pricing under the New PPA. Thus, the actual savings associated with the New PPA over the term of the agreement cannot be quantified at this time. Overall, the long-term forecast of natural gas prices used by JCP&L and Calpine in establishing the Fixed Charge component of the pricing under the New PPA appears to provide an acceptable level of benefits to customers relative to the potential risks associated with such projections.

The Board further FINDS that the New PPA contains provisions ensuring that JCP&L will receive guaranteed amounts of energy during on-peak periods, when the energy has the most value, while providing JCP&L with greater flexibility in scheduling. JCP&L also has the option to purchase up to 67 MW per hour of additional energy at any time through June 30, 2011 at the LMP, thereby providing additional benefits relative to the Existing PPAs.

JCP&L has requested that the Board permit all amounts paid by JCP&L under the New PPA to be recovered on a full and timely basis, and that any above-market costs be recovered through the MTC. The Board HEREBY FINDS that JCP&L shall be able to fully and timely recover from its electric customers all incurred costs and charges associated with the New PPA through the established rate recovery mechanisms, including recovery of above-market payments through the MTC. The Board further DIRECTS that all savings resulting from the New PPA shall be passed through to JCP&L's customers on a full and timely basis, again through the established mechanisms, in particular through the application of the up front approximate \$52.8 million net Restructuring Credit payment (as adjusted, as discussed above and below) to reduce the MTC Deferred Balance. As noted above, the actual savings associated with the New PPA relative to the Existing PPAs may be higher or lower, depending on whether the natural gas price projections used to establish the Fixed Charge component of the pricing under the New PPA are higher or lower than actual natural gas prices over the term of the agreement. Based upon the foregoing, the Board HEREBY APPROVES the New PPA, consistent with, and pursuant to, the provisions of N.J.S.A. 48:3-61(l). In so doing, the Board emphasizes that, while the projected savings associated with this New PPA appear to be significant, the Board notes that JCP&L still projects substantial deferred amounts under its existing NUG contracts. Therefore, the Board continues to

DIRECT JCP&L to take all reasonable measures to mitigate the stranded costs associated with its NUG purchase power agreements, as set forth in the Final Order.

JCP&L is seeking recovery of certain transaction expenses related to the restructuring of the Existing PPAs and the entering into of the New PPA. JCP&L proposes to net said transaction expenses against the amount of total restructuring savings that will be used to reduce the MTC Deferred Balance. The Board FINDS that the recovery of reasonable and prudent NUG restructuring transaction expenses is appropriate, and JCP&L shall be afforded an opportunity to seek recovery of such transaction expenses in connection with JCP&L's annual post-transition MTC Deferred Balance submission, as directed by the Board in its Final Order.

With regard to the requests of JCP&L and Calpine for confidential treatment of certain information contained in the joint petition and the New PPA as described above, the Board HEREBY FINDS that these issues should be decided by the Board's Custodian of Records pursuant to the Board's regulations, if and when a request is made for release of such information under the Open Public Records Act pursuant to N.J.A.C. 14:1-12.1 et seq.

The Board HEREBY DIRECTS JCP&L to submit evidence of the application of the Restructuring Credit payment to its MTC Deferred Balance, within ten (10) days of such payment.

The Board also HEREBY FINDS that the negotiation and execution of the Amended GSAs between PSE&G and Calpine should provide several immediate economic benefits to PSE&G's firm customers relative to the existing Interim GSA between PSE&G and JCP&L. An immediate and noteworthy benefit of the Amended GSAs will be the receipt by PSE&G of the up-front buyout payment in the amount of \$22 million, which within two days of the effective date of the Amended GSAs, will be credited by PSE&G to the fixed cost component of its firm customers' total natural gas costs, consistent with prior BGSS/LGAC treatment. The front-end loading of these savings through the buyout payment will help to mitigate the potential impacts on firm gas customers.

The Board FINDS that the Amended GSAs maintain the delivery of natural gas by PSE&G to Calpine up to the full requirements of the Facilities and leaves both PSE&G and its gas customers as well off as they are under the existing Interim Agreement. The Amended GSA for the Newark Facility is also more suited to the anticipated conversion of the Newark Facility's operation from a baseload operation to one dictated by economic dispatch. The Amended GSA for the Parlin Facility contains fixed monthly demand charges, regardless of the Parlin Facility's level of operation, thereby preserving an economic benefit to PSE&G and its firm gas customers. The retention of the pipeline capacity currently used to meet the sales obligations of PSE&G to JCP&L under the Interim GSA preserves the peak day supplies that PSE&G's customers currently receive. The Board HEREBY APPROVES the Amended GSAs.

With regard to PSE&G's request for confidential treatment of certain information contained in the joint petition and the Amended GSAs as described above, the Board HEREBY FINDS that this issue should be decided by the Board's Custodian of Records pursuant to the Board's regulations, if and when a request is made for release of such information under the Open Public Records Act pursuant to N.J.A.C. 14:1-12.1 et seq.

The Board HEREBY DIRECTS PSE&G to submit evidence of the application of the Buyout Payment, as set forth above, within ten (10) days of such payment.

Lastly, the Board recognizes that the benefits to PSE&G's firm customers under the Amended GSAs between PSE&G and Calpine can be realized only if both the Amended GSAs and the New PPA have coincident effective dates. The effective date shall be the earliest date on which both the Amended GSAs and the New PPA can mutually become legally binding on all parties to the respective agreements, but not later than June 30, 2004. The Board HEREBY DIRECTS JCP&L and PSE&G to cooperate with each other to ensure that the New PPA and the Amended GSAs become effective on the same date.

DATED: **March 24, 2004**

BOARD OF PUBLIC UTILITIES
BY:

(SIGNED)

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PRESIDENT

(SIGNED)

FREDERICK F. BUTLER
COMMISSIONER

(SIGNED)

CAROL J. MURPHY
COMMISSIONER

(SIGNED)

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